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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE: GENENTECH HERCEPTIN)
(TRASTUZUMAB) MARKETING AND) Case No. 16-MD-2700-TCK-JFJ
SALES PRACTICES LITIGATION.) ALL CASES

TRANSCRIPT OF RECORDED PROCEEDINGS
OCTOBER 10, 2017
BEFORE THE HONORABLE JODI F. JAYNE, MAGISTRATE JUDGE PRESIDING
SCHEDULING CONFERENCE

Greg Bloxom, RMR, CRR
United States Court Reporter
Northern District of Oklahoma

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A P P E A R A N C E S

FOR THE PLAINTIFFS:

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1 PROCEEDINGS:

2 -----

3 **THE DEPUTY COURT CLERK:** This is case number 16-MD-
4 2700-TCK-JFJ, In Re: Genentech Herceptin Marketing and Sales.
5 Counsel, please enter your appearance for the record.

6 **MR. KEGLOVITS:** Dave Keglovits, Amy Fogleman, Adam
7 Doverspike and Wes Pebsworth on behalf of plaintiffs.

8 **MR. O'CONNOR:** Bill O'Connor, Alicia Donahue, Gabe
9 Egli and Becky Schwartz for Genentech.

10 **THE COURT:** All right. Before we get started today, I
11 just want to cover two quick procedural issues. I know you all
12 are aware of both the these but I just want to be clear and put
13 it on the record.

14 Judge Kern issued, I think, five discovery orders, and he
15 took over handling all discovery issues after Judge Wilson's
16 resignation. Going forward, obviously, we're going to be
17 operating pursuant to our normal local rules' referral of
18 discovery process. I think it's possible, given that he's
19 entered five discovery orders, he may want to -- I mean, it's
20 possible he will withdraw some of those referrals if they
21 relate specifically to his orders, but you all should assume
22 that any discovery issues are going to be decided by me unless
23 you see something on the record.

24 The other thing is that, as I'm sure you all are aware, I
25 was -- I was Judge Kern's law clerk on this case before I

1 became the magistrate judge, so I am familiar with a lot of
2 these issues, I have background on these issues that a new
3 judge would not typically have. I just wanted you to be clear
4 on that. That doesn't mean I don't want your education, I
5 always welcome education on any issues, but when you file
6 briefs, you're not starting from the blank slate that you might
7 normally be with a new judge.

8 Are there any questions about either of those two things?

9 **MS. DONAHUE:** No, Your Honor.

10 **THE COURT:** Okay. We're here today on Judge Kern's
11 referral of the issue of amending the phase I scheduling order.
12 I guess that the prior order is docket 188 and it's called Case
13 Management Order Number 2. So we're here on the issue of
14 amending that. Your briefs on this issue are at docket 266 and
15 267.

16 I want to conduct this hearing, I think, in three parts.
17 First, I want to hear from the plaintiff on any anticipated
18 additional requests, and I'm talking about additional
19 custodians or additional things that are going to come up. I
20 know we have Mr. Nolden, but I want to know anything else that
21 you think I need to know could possibly impact how long we need
22 on this schedule. And then I want to hear from each of you on
23 arguments in favor of your proposed schedules. And then,
24 third, I want to cover the expert rebuttal affidavits issue.
25 And I'm going to take those each separately. So, first,

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1 whoever from plaintiffs, I'd like to hear from you to start.

2 My understanding from Judge Kern's September 12th order is
3 that he specified sort of a universe of custodians, and said
4 these are the people for now, and if you want anybody else,
5 there's a process that you're going to need to go through and
6 here's the process. So, I want to know where you are on that
7 and how many more we might be expecting.

8 **MR. KEGLOVITS:** Okay. If I may start, Your Honor,
9 with welcome to the case.

10 **THE COURT:** Thank you.

11 **MR. KEGLOVITS:** I'm delighted you're on the bench. I
12 know I speak for Bill and Alicia and her team, that we're
13 really glad to have you in a new capacity in the case.

14 **THE COURT:** Thanks.

15 **MR. KEGLOVITS:** I brought a little list of hearing
16 topics that we thought might be helpful in working through some
17 of these issues, and they include the things that you just
18 mentioned, so I can hand that up to Your Honor or just work off
19 this as my notes.

20 **THE COURT:** Why don't you tell -- sure, you can hand
21 it up, but also tell me what I didn't cover that you think we
22 need to cover.

23 **MR. KEGLOVITS:** Okay.

24 **THE COURT:** You didn't think I was going to be ready,
25 did you, Mr. Keglovits?

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1 **MR. KEGLOVITS:** I knew you would. As I get older, I
2 need things like this to help me remember what I'm supposed to
3 say. And, for the record, I called Bill and Alicia yesterday
4 and we walked through these things, so I don't think --

5 **THE COURT:** Okay. Well, I --

6 **MR. KEGLOVITS:** These are not submitted jointly, but
7 they do at least know the things that I'm interested in talking
8 about.

9 So, what I've got here is the phase I discovery schedule.
10 The Patheon production deadline, I think, is going to be a
11 piece of this puzzle that really I don't know was covered in
12 any of the three things that you mentioned specifically, as
13 well as the privilege claim process, --

14 **THE COURT:** Okay.

15 **MR. KEGLOVITS:** -- because that is starting right now.

16 As far as additional items, you are correct about the
17 custodians. And to date, we have provided all the custodians
18 we think we will need, and Genentech has confirmed that they
19 will produce from all of those custodians. So, as I'm standing
20 here today, I don't have any additional --

21 **THE COURT:** Okay.

22 **MR. KEGLOVITS:** -- custodians I intend to ask
23 Genentech to search. As I told Alicia and Bill yesterday on
24 the call, that's always subject to the caveat that, as we get
25 additional documents, we may find someone that we never thought

1 we would see. But as we stand here now, I don't think you're
2 going to have additional custodians to deal with.

3 There are some questions about the sources of documents
4 that are being searched, and I think that may be germane to the
5 question of how long this will all take. If you don't mind,
6 Mr. Doverspike can deal with that and then --

7 **THE COURT:** Let me stop you. On the source --

8 **MR. KEGLOVITS:** Okay.

9 **THE COURT:** -- of the documents, is that the issue in
10 the September 19th letter from Ms. Donahue to you that sets
11 forth the databases and so you're talking about you might
12 need -- now that you have that letter, that's impacting some of
13 the scope of where you want them to look; is that correct?

14 **MR. KEGLOVITS:** It has to do with one of the
15 databases, what they call their standard operating procedures
16 database, as well as paper documents, because we focused a lot
17 on all of the electronic places where information is stored and
18 we want to get some understanding of whether paper documents
19 are being searched, and those would be paper documents
20 obviously not included electronically in a database.

21 **THE COURT:** Okay. Well, then let's take those --
22 okay. Go ahead. Tell me about number 2 and number 3.

23 **MR. KEGLOVITS:** Number 2 on my list is just the
24 briefing schedule, as Your Honor mentioned. I'm not sure --

25 **THE COURT:** Okay.

1 **MR. KEGLOVITS:** -- if that's the number 2 you're
2 referring to.

3 **THE COURT:** Yeah, yeah.

4 **MR. KEGLOVITS:** Okay. And then number 3 is a hearing
5 calendar, because as we were thinking about this, I thought it
6 would be either helpful to leave today with another date
7 scheduled on the docket so as we make progress or we don't make
8 progress we're moving toward another time to appear before Your
9 Honor, or if Your Honor would prefer to have even a more
10 regular setting like every two weeks or four weeks or whatever
11 it would be. But the plaintiffs' preference would be to have
12 something else on the calendar when we leave today.

13 **THE COURT:** And I am amenable to that. Once we set
14 this schedule, my goal is going to be to keep that schedule and
15 I'm going to view it as part of my job to help you all do that
16 and I want to be available, and Camie's phone line is going to
17 be open to you. Even if there's issues -- I was going to say
18 this at the end -- but you know local Rule 37.2(b) allows for
19 phone calls, you know, and if you don't want to have a full
20 briefing cycle because that's going to put us, you know, where
21 we can't get this decided in time, I welcome you to call Camie
22 and try to set that up. I might say, "Listen, I can't decide
23 that on the phone, you're going" --

24 **MR. KEGLOVITS:** Sure.

25 **THE COURT:** -- "to have to brief it." But I'm happy

1 to try to set those up and expedite those types of things.

2 Are you all still having your weekly meet-and-confers?

3 **MR. KEGLOVITS:** I don't know that they're weekly
4 anymore.

5 **THE COURT:** I thought they were.

6 **MR. KEGLOVITS:** They're more as needed --

7 **THE COURT:** Okay.

8 **MR. KEGLOVITS:** -- that we've been doing them.

9 **THE COURT:** Well, you know, I'm happy to set a hearing
10 at the end of this but, you know, I would expect you all to
11 call me and cancel it if --

12 **MR. KEGLOVITS:** Absolutely.

13 **THE COURT:** -- there's nothing to talk about. But
14 I'll thing about that, but I'm --

15 **MR. KEGLOVITS:** Okay.

16 **THE COURT:** -- very amenable to that process.

17 **MR. KEGLOVITS:** So, as I mentioned, --

18 **THE COURT:** Okay.

19 **MR. KEGLOVITS:** -- on the additional sources, if you
20 need more detail about the database and the paper,
21 Mr. Doverspike would be the one on our team to talk about that.

22 **THE COURT:** Well, let's go in order then. Under this
23 final phase I discovery schedule, Patheon production deadline,
24 let's talk about that, and then the privilege claim process,
25 and then the sources of documents.

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1 **MR. KEGLOVITS:** Okay. You'll recall that the court
2 granted the motion to compel --

3 **THE COURT:** Yes.

4 **MR. KEGLOVITS:** -- the production of Patheon. K&L
5 Gates, I think, was representing Patheon. The lawyer at K&L
6 left and joined a new firm. I don't know whether he's entered
7 an appearance under his new firm, but he's represented to us
8 that he's going to continue his representation of Patheon.

9 He sent us an e-mail Monday, I believe, of this week saying
10 he understood the competing proposals were essentially two
11 months for us to finish discovery, or six months from
12 Genentech, and that Patheon could comply and produce within
13 either of those two schedules. But I do think it would be
14 important to have a date certain for Patheon to complete its
15 production, because while the order compelled them to produce,
16 it didn't give them a date by which they needed to produce.
17 And so --

18 **THE COURT:** Did he -- What's your proposal for that
19 date?

20 **MR. KEGLOVITS:** I would like it to be short of the end
21 date on discovery so that we can use them in depositions. You
22 know, ideally, 30 days short of the end date on discovery.

23 **THE COURT:** Okay. That's Judge Kern's order, but my
24 guess is that he would not mind me, you know, amending that to
25 add a deadline. So I'll take that under advisement at the --

In Re: Genentech Herceptin (10-10-2017 Scheduling Conference)

11

1 **MR. KEGLOVITS:** Okay.

2 **THE COURT:** -- end, as well.

3 Privilege claim process.

4 **MR. KEGLOVITS:** Ms. Fogleman can address where we are
5 on that.

6 **THE COURT:** Okay.

7 **MR. KEGLOVITS:** There's not an issue present right
8 now, but it's going to be built into the time line.

9 **THE COURT:** Okay.

10 **MS. FOGLEMAN:** Good morning, Your Honor.

11 **THE COURT:** Good morning.

12 **MS. FOGLEMAN:** We're really in the beginning stages of
13 this privilege claim issue, so we wanted to go ahead and just
14 alert you to it. We received their -- first, a little
15 background.

16 The ESI protocol in this case allows 60 days for production
17 of a privilege log from the date of the production of
18 documents. So, this current dispute -- or we received our
19 first privilege log from them, and it was timely, on September
20 26th, and it dealt with documents from production 21.
21 Production 21 occurred on July 28th. So we get the documents
22 on July 28th, we get the log on September 26th. All of these
23 documents were from the custodial file of Dr. Camellia Zamiri
24 who was deposed a month before we got the privilege log, and so
25 she was deposed on August 24th. So we received the log and it

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1 has 623 entries and we've reviewed it and we're challenging 484
2 of those entries.

3 **THE COURT:** Okay.

4 **MS. FOGLEMAN:** So we've raised this for you to let you
5 know these disputes are out there. We sent them the letter
6 last week. They haven't had an opportunity to respond. I
7 don't intend to go into the merits of those --

8 **THE COURT:** Okay.

9 **MS. FOGLEMAN:** -- claims since they haven't --

10 **THE COURT:** Sure.

11 **MS. FOGLEMAN:** -- we haven't had a meet-and-confer on
12 it yet. But we raised it because we wanted to let you know it
13 was out there and also because we feel like there's an issue
14 with this 60 days and the ESI protocol under the expedited time
15 frame that we're dealing --

16 **THE COURT:** Sure.

17 **MS. FOGLEMAN:** -- with here because we have -- and
18 these facts kind of show you where the problems are. You know,
19 we've already deposed the witness that these documents -- whose
20 files these documents came from. And so we've asked them, and
21 they haven't had an opportunity to respond yet, but we have
22 asked them if they would agree to shorten that 60-day window
23 because we want to be able to resolve these privilege claims as
24 expeditiously as possible.

25 **THE COURT:** In light of those 484 possible disputes,

1 and I'm sure you'll work a lot of those out, but do you -- I
2 mean, do you still think you -- are you still sticking with
3 your two months? I mean, this sounds like there's going to be
4 some work to be done on these, but --

5 **MS. FOGLEMAN:** I think we are.

6 **THE COURT:** Okay.

7 **MS. FOGLEMAN:** I mean, we are sticking with it. We
8 think -- I mean, just a preview -- again, I don't want to go
9 into the merits -- but these really fall into two categories.
10 I mean, so it's not like there's a bunch of random privilege
11 disputes.

12 **THE COURT:** Okay. Work product, I'm guessing, or --

13 **MS. FOGLEMAN:** Well, no, there's --

14 **THE COURT:** No?

15 **MS. FOGLEMAN:** -- not even a work -- they didn't
16 assert work product --

17 **THE COURT:** Okay.

18 **MS. FOGLEMAN:** -- except with just a handful of
19 documents. I mean, 205 of those communications do not have an
20 attorney on the communication. They're communications between
21 nonattorneys, and they've asserted the privilege over those.
22 We think that those things are presumptively not privileged
23 unless they can show that the communication itself reflects an
24 attorney-client communication. So, if you have an e-mail from
25 one business person to another saying, "I talked to the

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1 attorney and she said blah, blah, blah," then maybe that
2 portion of it could be redacted, but the entire communication
3 between the two business people we don't think is privileged.
4 So that's one broad category --

5 **THE COURT:** Okay.

6 **MS. FOGLEMAN:** -- that if we get a ruling from you on
7 that, then maybe that will help, because there have been
8 multiple productions, so we're going to have lots of these logs
9 coming forward. So, if we get some rulings right out of the
10 box as to what the parameters are, then we think that can
11 streamline it later on.

12 **THE COURT:** Okay.

13 **MS. FOGLEMAN:** The second category, 279 communications
14 that just cc an attorney or has an attorney listed as one of
15 multiple recipients. And so we think that what they've done,
16 at least on this first log, is any communication that has an
17 attorney on it has been claimed privileged, and these are
18 in-house lawyers, many of them work in business -- I mean, it's
19 a typical -- this is the problem you have in privilege disputes
20 all the time, is your in-house lawyer working as a lawyer or as
21 a business person? And so you'll have a document with 20
22 recipients, only one of whom is a lawyer, and they've claimed
23 privilege. And it raised a red flag because there are 334
24 communications on the log listing one lawyer, Ms. Gross, as a
25 recipient. They've only produced three documents that she was

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1 a recipient on, and that was three copies of the same e-mail.
2 So, we think that that's what's happened here. And again, this
3 was the first log, everybody is kind of working through the
4 process, we're hopeful we can resolve this. But because these
5 do fall into two broad categories, we think either the parties
6 can work it out or we can get some kind of broad --

7 **THE COURT:** Ruling?

8 **MS. FOGLEMAN:** -- ruling from the court that will
9 guide the process going forward.

10 **THE COURT:** Okay. Thank you for bringing that to my
11 attention. That will certainly impact what we do here today.

12 **MS. FOGLEMAN:** Thank you.

13 **THE COURT:** Okay. On those -- oh, I'm sorry. We
14 still have sources of documents from Mr. Pebsworth; right? Oh,
15 Doverspike. Sorry. Sorry about that.

16 **MR. DOVERSPIKE:** No problem, Your Honor. Thank you.

17 **THE COURT:** There's a lot of you here.

18 **MR. DOVERSPIKE:** Yes, there are, a lot to keep track
19 of.

20 On sources of documents, as you mentioned, Genentech
21 provided us a list of newly revealed sources that may contain
22 responsive information. We've exchanged letters since then and
23 Genentech has agreed to produce from some of those databases
24 and provided more information on why they don't intend to
25 produce from others.

1 So I believe we're down to two real categories where we
2 don't see eye to eye. The first is their database that
3 contains their standard operating procedures. We believe
4 standard operating procedures related to how they communicate
5 with the FDA and their manufacturing process and the types of
6 changes and things they could have done are relevant to the
7 preemption issue and we've asked them to produce those. We're
8 obviously willing to work out using our current search terms or
9 a narrower list in that search, but right now they don't intend
10 to produce the standard operating procedures from that
11 database.

12 And then the second is paper files. That could cover a lot
13 of different things, to our knowledge. They haven't identified
14 a specific paper file but we know they have Legacy systems that
15 are harder to access. Probably the most vivid example is
16 Mr. Robert Garnick who they identified as a former employee
17 likely to have substantive knowledge on multiple of the
18 interrogatory answers. When they produced his custodial file,
19 it only included five documents. And we asked them, "Is this
20 everything? Have you looked in the paper files?" And their
21 response was, "Genentech at this time has no knowledge of
22 additional sources of documents for Robert Garnick."

23 So, we think they need to be looking in the paper files,
24 especially for these former employees who were involved in the
25 1998, '99, 2000, 2001 era where there might not be as many

1 electronic documents for those employees.

2 **THE COURT:** Are there paper files?

3 **MR. DOVERSPIKE:** We believe there are, but I don't
4 know that we've gotten a definitive answer on that. We've
5 heard of Legacy systems, and our understanding is that those
6 include paper files.

7 **THE COURT:** Oh, okay. The word "systems" implied to
8 me that that would not include paper files, but --

9 **MR. DOVERSPIKE:** I could be confused about --

10 **THE COURT:** Okay.

11 **MR. DOVERSPIKE:** -- their internal workings.

12 **THE COURT:** Yeah.

13 **MR. DOVERSPIKE:** A lot of the last year has been
14 trying to learn those things.

15 **THE COURT:** Yeah.

16 **MR. DOVERSPIKE:** And it would be good for them to
17 clarify if there are paper files and if they intend to produce
18 from them. Right now, our understanding is they do not.

19 **THE COURT:** So what are you asking me to decide here
20 today on these issues?

21 **MR. DOVERSPIKE:** Sure. That those -- mostly that that
22 affects the size and scope of what needs to be discovered. So
23 whether they're included or not, we believe that Judge Kern's
24 order listing -- asking them to list sources that may contain
25 relevant information was to prompt this discussion on whether

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1 they need to be searched, and we've worked out most of those.
2 I think we'd seek an order saying that these standard operating
3 procedures are relevant to the preemption issue and should be
4 produced, and paper files related to these custodians also
5 contain responsive relevant information and should be produced.

6 **THE COURT:** Okay.

7 **MR. DOVERSPIKE:** Thank you, Your Honor.

8 **THE COURT:** Thank you.

9 Okay. I would like to hear from you all on those three --
10 I guess there's really not anything on the additional
11 custodians, so just the Patheon deadline, if you have any input
12 on that, the privilege claim and how much time you think that's
13 going to add and what that involves, and then the sources of
14 documents issue.

15 **MS. DONAHUE:** Thank you, Your Honor.

16 **THE COURT:** Thank you.

17 **MS. DONAHUE:** And thank you for allowing me to be
18 here. It's a pleasure to meet you.

19 **THE COURT:** Yes, you too.

20 **MS. DONAHUE:** It's a pleasure to be in Tulsa.

21 **THE COURT:** Yes. It's nice to put faces with the
22 names of briefs I've been reading.

23 **MS. DONAHUE:** So just kind of as an overview to start
24 up, I think what we would say generally in response to the
25 subcategories under, you know, item number 1 here, is that, you

1 know, when we get to this briefing schedule and the scheduling
2 order and, you know, our request for the six months, each of
3 these issues, you know, we believe supports, you know, our
4 rationale for needing more time because it is a work in
5 progress and there's a lot going on.

6 I do think, though, it's worth talking a little bit about
7 the custodians and the additional custodians because we've
8 prepared a list showing, you know, what the additional 51
9 that's the subject of Judge Kern's -- or maybe your September
10 12th order. If I could hand that up?

11 **THE COURT:** That's all Judge Kern's.

12 **MS. DONAHUE:** Okay. It kind of shows where we are on
13 that process and gives the court some indication of what that
14 process entails.

15 You know, the truth is that we don't know exactly what is
16 in each of these files. We're currently looking through them,
17 collecting them. There's 27 of the people on this list are
18 former employees. To Mr. Doverspike's point, there are --
19 there very well may be paper for some of these folks and we're
20 looking for it and when we find it we'll go through it.

21 But, you know, the process is a long one and it's timely
22 and we can't help the fact that it's timely. It just is.
23 That's not because we're delaying or doing anything other than
24 doing our due diligence. You know, reviewing for privilege and
25 redacting, you know, for privacy, we have a lot of HIPAA issues

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1 here with, you know, patient privacy on various things, other
2 products. So, you know, there's a lot that goes into the
3 process of collecting, reviewing, and I can walk you through
4 that process, but it's just -- it's time consuming. So, that
5 alone, I think, you know, gives the court some indication of
6 the reason why we need -- it would be really impossible for us
7 to get this custodial issue complete in the next 30 days or so.

8 **THE COURT:** Did I read that -- I feel like something
9 said there was only 30 of the 50 that there were custodial
10 files for. Is that accurate?

11 **MS. DONAHUE:** That's what we -- 30 that we've been
12 able to locate so far.

13 **THE COURT:** Okay.

14 **MS. DONAHUE:** We're still looking. Thirty for which
15 we have some form of electronic --

16 **THE COURT:** Okay.

17 **MS. DONAHUE:** -- documentation that we can trace. In
18 terms of the --

19 **THE COURT:** But you haven't stopped looking for those
20 other 20?

21 **MS. DONAHUE:** Yeah, in terms of the paper, we're still
22 looking.

23 **THE COURT:** Okay. Go ahead.

24 **MS. DONAHUE:** Okay. So then in regard to the Patheon
25 issue, to answer your question, no, I think what Mr. Keglovits

1 has proposed in terms of, you know, a time line for that is
2 fine as far as we're concerned. We haven't been in touch with
3 Patheon. I think he must have looked at the docket for the
4 order because we haven't talked to them since that order --

5 **THE COURT:** Okay.

6 **MS. DONAHUE:** -- came down.

7 As to the privilege process and the sources of documents,
8 we got the letter on privilege, you know, late last week, and
9 we got the letter on the sources of documents responding to our
10 database letter Friday night. So, you know, we would like an
11 opportunity to consider, to meet and confer, to start that
12 process, and would request that the court not make any ruling
13 on the substantive issues raised in those letters at this
14 point.

15 To further address those, Mr. Egli and Ms. Schwartz, my
16 colleagues, know some -- you know, have some knowledge with
17 which to address the issues raised by the plaintiffs, but we're
18 not there yet at all in terms of informing the court of our
19 full positions on those. I do hope that we can work out the
20 privilege log issues quite a bit, but, again, that process is
21 going to take time.

22 So, I mean, all of this is just a way of kind of teeing
23 up -- hopefully we can have a full discussion as to their
24 position on timing, --

25 **THE COURT:** Yes. That's next.

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1 **MS. DONAHUE:** -- our position on timing, and that's
2 what we'll do next.

3 **THE COURT:** Great. Okay. Thank you.

4 **MS. DONAHUE:** Thank you.

5 **THE COURT:** Okay. I think on this issue I'd like to
6 start with defendant and hear from you, because you obviously
7 have more -- the most information on what still needs to be
8 done and why we need the amount of time that you are asking
9 for.

10 **MS. DONAHUE:** Okay.

11 **THE COURT:** Now, I want to make sure I understand what
12 you guys agree on because I feel like -- it's my understanding
13 that everyone agrees on a written discovery deadline one month
14 prior to the final discovery cutoff. You both have that in
15 your proposals. Is that correct, defendant?

16 **MS. DONAHUE:** We agree, but we are not adverse --

17 **THE COURT:** I know you don't --

18 **MS. DONAHUE:** -- to them taking depositions as we go
19 if they decide they'd like to do that.

20 **THE COURT:** Okay.

21 **MS. DONAHUE:** But we're agreeable to -- either way.

22 **THE COURT:** You both -- but is it correct that you
23 both have in your proposed schedules one month prior to the
24 final discovery cutoff of written discovery? Did I
25 misunderstand that?

1 **MS. DONAHUE:** I think it was document -- I think what
2 they have proposed is a bifurcation so that document production
3 is completed and 30 days post that their eight depositions,
4 eight remaining depositions.

5 **THE COURT:** And yours is the same, --

6 **MS. DONAHUE:** Ours is the same but I think --

7 **THE COURT:** -- is it not, document production?

8 **MS. DONAHUE:** -- I think we put a caveat in there that
9 said we're not -- we are amenable to them taking depositions as
10 they go if they'd like to do that. It doesn't have to be one
11 or the other, in other words.

12 **THE COURT:** Okay.

13 **MS. DONAHUE:** Okay?

14 **THE COURT:** Okay. Got it. So it sounds like there is
15 no disagreement on that.

16 And then you also agree on the 14, 28, and 21 days; it's
17 just a matter of when we're going to have this cutoff be. So
18 you agree on a lot of things. Just that and then the expert
19 rebuttal issue.

20 So let's start from defendant, and I want to hear from you
21 on your reasons for requesting the time frame that you've
22 requested.

23 **MS. DONAHUE:** Okay. Thank you.

24 **THE COURT:** Yes.

25 **MS. DONAHUE:** Again, we have what we've put together

1 as the discovery time line. And as you say, you are familiar
2 with a lot of this given your history with the case, but we
3 wanted to put things in context for the court and to try to,
4 you know, give some understanding to how we arrived here today.

5 What we're proposing is six months to complete discovery.
6 And what I would tell the court and what we said in our
7 submission and that we sincerely mean is that we will do our
8 best to come in under that, but we have had so many fits and
9 starts and so many distractions via motion practice and
10 meet-and-confer letters and all kinds of things that, you know,
11 our point is give us -- we want a final deadline and we want to
12 be finished by that deadline and we don't want to have to come
13 back to you asking for more time. So we're trying to make sure
14 that we have enough time to go through the 51 additional
15 custodians that have now been added. I think plaintiffs' point
16 is that, "Well, you did those first additional 17 -- I mean,
17 the first 17, you know, in a certain amount of time, so you
18 should be able to do these quicker because they probably have
19 less documents."

20 The process that we go through to produce the documents is
21 very time intensive. You know, it starts by interviewing
22 employees, collecting everything that they've got. You know,
23 imaging their computers. If we can get their e-mails remotely,
24 but if they're not in south San Francisco, we have to have
25 their computers sent to us, and then we image them -- if they

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1 are in south San Francisco, we image them, and then we send
2 them to a third-party vendor who loads them up on a searchable
3 platform. We do, you know, the search term review, and then we
4 give it to -- I'm going to get this confused, and Gabe is
5 probably thinking, "No, you missed that," -- but ultimately it
6 goes to -- we have 50 lawyers who are reviewing them for
7 privilege, redaction for other products, redaction for privacy
8 information, and we've got, you know, people working seven days
9 a week to get this done, and still, you know, you can see where
10 we are.

11 So, we've completed, of the original 17 that were, you
12 know, first identified for us and were the first subject of the
13 May 8th order, we have completed four. They have four full
14 custodial files. They are substantially completed, we have
15 substantially completed the entire 17, but there's still some
16 trickling in of documents that go through this review process.

17 I was under the impression that we were reviewing it
18 custodian by custodian, but in reality we do it, you know, in
19 phases of what the review -- what review is going on, you know,
20 at a specific time because that is the most expeditious way to
21 do it. In other words, if the reviewers are reviewing for
22 privilege, they're reviewing, you know, a number of custodians
23 for that particular privilege, and that makes it go quicker.

24 So, that's why substantial completion is sometimes, you
25 know, a little bit longer than --

1 **THE COURT:** I understand. You're not finishing one
2 custodian and --

3 **MS. DONAHUE:** Yeah. Right.

4 **THE COURT:** -- then starting the next.

5 **MS. DONAHUE:** Exactly. Exactly.

6 I think Judge Kern, in his September 12th order, you know,
7 anticipated a significant extension of the discovery in order
8 to get it completed. And I don't think that, you know, five
9 weeks from now or the November 22nd deadline for us to get all
10 this production done, number one, it's not significant, and,
11 number two, in all honesty, Your Honor, it's impossible and we
12 cannot do it. We'd like to be able to. You know, we don't
13 have any skin in the game of delay. We have a motion on file
14 that's been on file for over a year that we'd like to get
15 heard. This is not to delay. I mean, no motivation for delay
16 at all.

17 So, our six months, you know, anticipates a realistic
18 deadline that we can comply with and not seek additional time
19 from the court. It anticipates the issues that the plaintiffs
20 have raised under their, you know, point number 1.

21 There are going to be -- there's going to be some more
22 back-and-forth. I mean, historically, that's just how this
23 case is operating, unfortunately, you know, there's not a lot
24 of agreement on a lot of stuff. So, we think six months is
25 reasonable and that it's doable and that, you know, we won't be

1 back and that we'll finally be finished and we can move on to
2 having them respond to our motion and the motion heard and take
3 it from there.

4 **THE COURT:** Let me ask you one question. Plaintiffs,
5 I feel like in their briefs, they're kind of -- their argument
6 is, to some extent, that defendants have -- I think in the last
7 section -- that the defendants have been secretive, they've
8 been misleading, and that maybe -- I feel like part of what
9 they're arguing is that, whatever you say, I should view with
10 some degree of skepticism because of past practices in this
11 case, and I want to hear your response to that.

12 **MS. DONAHUE:** Quite frankly, I'm offended by it. We
13 haven't been secretive, we haven't been anything other than
14 above board. As you can see from the time line, we've made 45
15 productions of documents, rolling productions. As I said
16 before, we have spent hundreds of thousands of dollars. We
17 have 50 lawyers working on just the document issue alone.

18 You know, I think the time line also puts in context the
19 fact that Judge Wilson -- you know, the key issue on some of
20 this discovery, Your Honor, was custodial files. We felt very
21 firmly and argued very vehemently that custodial files should
22 not -- we should not have to produce, review, etc.

23 Judge Wilson, you know, took almost a year to consider that
24 issue. We were on a standstill from -- you know, the first
25 discovery hearing occurred on August 3rd and we got our first

1 order compelling us to do the -- you know, to produce more than
2 we had produced already on May 8th. So, there was no
3 misleading on our part. There was no delay on purpose on our
4 part. We were waiting to see what Judge Wilson was going to
5 tell us to do in terms of these custodial files.

6 He also told us to, "Go look and see what you've got but
7 don't review, don't collect, don't -- you know, Genentech, I'm
8 not telling you to do any of that and I don't want you to do
9 that," and so we didn't. You know, and I don't think we can be
10 faulted for not wanting to spend the time and money that we may
11 never have had to spend.

12 So, once we got the May 8th order, you can see that we
13 expeditiously started doing everything that the order -- you
14 know, that we were compelled to do by the order, and that the
15 order of productions speak for themselves. You'll see
16 production after production after production. Before that, we
17 did -- I think we did five productions before the first
18 discovery hearing and we continued to do productions of
19 noncustodial files after the first discovery hearing.

20 So I don't know if that answers your question but, you
21 know, this is my first time appearing before you and I would
22 hope that you would please give me the bene- -- us the benefit
23 of the doubt and know that we are not -- that characterization
24 of how we operate is just inaccurate and not true.

25 **THE COURT:** Thank you.

1 **MS. DONAHUE:** Thank you.

2 **MR. KEGLOVITS:** Your Honor, so I think a short version
3 of the time line, the real time line here is going to be
4 helpful in assessing this adjective "significant" as it
5 modifies the extension.

6 Our case was filed April, 2015. The initial joint status
7 report was filed with the court on November 30th of 2015. In
8 that joint status report, Genentech said it needed 13 months,
9 it thought the case required 13 total months to do all of the
10 discovery in the case. Presumably, that would have included
11 their principal defense: preemption.

12 As you know, we made a side trip to the joint panel on
13 multidistrict litigation because Genentech was not content to
14 have different cases litigated in one district without being
15 forced to do it, so we went on that side trip and came back.
16 And we came here for our first case management conference on
17 June 24th, I think it was, of 2016. At that conference,
18 Genentech proposed to the court that we would stop everything
19 in the case, class certification, merits discovery, so that
20 they could present this simple purely legal defense:
21 preemption. And based on that representation, Judge Kern put
22 an order in place that had everything, discovery, briefing,
23 everything finished in 90 days, October 6th, 2016.

24 So here we are now, a year past the anniversary date that
25 was created by the court, because Genentech told the court all

1 of this can be done quickly and efficiently and will make the
2 processing of the case better.

3 We are not close, I admit, to having the document
4 production finished, but I don't know that that is our fault.
5 I think what Judge Wilson told the folks at this table was, "If
6 you insist on going out, collecting every document, reviewing
7 every document, don't come back to me and say that's going to
8 be a problem on timing, because that's a self-inflicted wound.
9 There are other ways to produce this information than reviewing
10 every page of it."

11 Genentech, to my knowledge, and I could be corrected, has
12 not even completed the production from Dana Swisher's files.
13 Mr. Swisher submitted an affidavit back in June, a long
14 affidavit filled with factual contentions, June of 2016. So
15 here we are, what, 14 months later and they haven't even
16 finished Mr. Swisher's production. They, I don't think, are
17 moving either efficiently or with a purpose to get this
18 finished.

19 So, when we got the court's order, we asked ourselves:
20 What do we do? Well, we thought one of the things to do would
21 be to engage Genentech in a conversation. There are a lot of
22 custodians left to search. And we said to them, and you'll see
23 the letters back and forth, "We want to know who these people
24 are. We know very little about them. It's possible that some
25 of them are duplicative or some of them may not be interesting

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1 to us. Let's talk about who they are. Let's talk about where
2 they are. Let's talk about what kind of documents they
3 have." The answer was, "No," and, in essence, it was, "You
4 asked for it, you're going to get it, and with whatever time
5 constraints that come along with that. We are not going to
6 give you anymore information about it."

7 **THE COURT:** Did you think Judge Kern's order gave them
8 that option?

9 **MR. KEGLOVITS:** Well, I don't know whether the order
10 itself contemplated that, but what we were offering was to
11 reduce the burden, to make this case process better.

12 **THE COURT:** But didn't Judge Kern say that you can
13 reduce the burden on yourself, you can either help them limit
14 this list or you can produce it all?

15 **MR. KEGLOVITS:** As I read it, and I may not remember
16 it correctly, it said you either have to produce everything or
17 send them a letter saying there are no documents for these
18 custodians. And what we were telling them was, "I think we
19 will agree to go back to the court and ask for a modification
20 of the first part of that to say you don't need to have all
21 those custodians if you just engage us in a dialogue." Why are
22 we throwing down this curtain that says, "We won't tell you any
23 information about these people?" We went so far as to ask,
24 "Have you at least sent discovery hold orders to all of the
25 custodians?" And the response from Genentech is, "We don't

1 have to tell you that. That's work product."

2 So that's the level of communication that Genentech has
3 been willing to give us. That, to me, is not a group that is
4 open in this process and one that should be accorded much
5 deference when they come to you and say, "It's going to take a
6 long time now."

7 I don't need to belabor the issue of whether they've made
8 accurate representations to the court. I don't blame the
9 lawyers at this table because I don't think they knew whether
10 there were organizational charts, but their client sent them in
11 here to say that a company of that size, a division of Roche,
12 has no organizational charts, and the court said to produce
13 them, and we get, what, 10,000 pages of organizational charts.
14 Of course, everybody knew there were organizational charts.
15 Why would Genentech ask them to come in here and say that? I
16 don't know.

17 And again, it's not a criticism of these lawyers, and
18 really it doesn't have anything to do with the case other than
19 to say we don't want to be forced into trusting them because we
20 haven't gotten accurate information from Genentech.

21 What we would really like to have happen here is to have
22 the discovery in this case finished by December 31st, 2017.
23 That is two-and-a-half years after our case was filed back in
24 April of 2015, and it is 18 months after Genentech took us down
25 this detour on preemption. We think that is plenty of time.

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In Re: Genentech Herceptin (10-10-2017 Scheduling Conference)

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1 **THE COURT:** Can I ask you a question?

2 **MR. KEGLOVITS:** Uh-huh.

3 **THE COURT:** Do you think that their efforts have been
4 reasonable since May 8th? I know -- I know you have issues
5 with everything that happened before that, and I don't think
6 anybody is really thrilled with that length of time, but since
7 May 8th, do you feel like that your -- their production of
8 documents has been frequent and appropriate?

9 **MR. KEGLOVITS:** I'm going to be honest with you, Your
10 Honor, I don't know anything about it, because they won't
11 share. We asked about time, "How long does it take to collect
12 the documents, how long does it take you to process them," and
13 they wouldn't share that information with us. So I don't have
14 a basis --

15 **THE COURT:** You don't know.

16 **MR. KEGLOVITS:** -- to say whether they're working
17 efficiently.

18 If you look at the number of documents that have been
19 produced, I think by our count we've had 64,000 documents
20 produced to us so far. I don't do a lot of this, but 50
21 lawyers to get 64,000 documents pushed out the door? The first
22 production, July of 2016, the last one, October 9th, I guess
23 last night. And they clearly are producing more now than they
24 were before.

25 But, you know, they built a process that was going to

1 generate this outcome. They insisted on this defense, which
2 made discovery broader than the claims. They resisted any
3 efforts that Judge Wilson put in front of them to reduce the
4 number of issues on which discovery would be sought. They
5 wouldn't agree to stipulate to any facts. That was one of the
6 solutions that he proposed. You say this is an issue of law,
7 then stipulate to all their facts, they should be material to
8 your motion. But they refused to do that. They put in two
9 affidavits, one is really from a fact witness, the other is
10 from a so-called expert on what the law is that's about 30
11 pages long. So they've made this a very fact-intensive,
12 laborious process, and they won't engage with us in a way to
13 try to reduce the time to get it done. So, you've made your
14 bed, let's get this done by December 31st.

15 If the court is inclined, I would say, to make it longer
16 than that, if we have some period longer than that, then I
17 would ask the court to consider some process with interim dates
18 where we can tell them, "You must finish these five custodians
19 by November 1st, you must finish these next five by November
20 15th," so we can at least try to prioritize the people we think
21 we need for depositions.

22 And then the last point I'll make is on the briefing. I
23 don't think there's really any dispute about the intervals
24 between the briefs. I do want to point out for the court,
25 though, that there is a possibility we could file a response

1 brief earlier than the last date that you give for us, so we
2 would want the reply brief to be tethered to the date of our
3 filing of the response brief and not a hard baked date. So
4 let's say we were able to get it on file two weeks --

5 **THE COURT:** Yes.

6 **MR. KEGLOVITS:** -- early, that doesn't build in a
7 two-week extension for them.

8 **THE COURT:** I think both of your proposals have it --

9 **MR. KEGLOVITS:** Okay.

10 **THE COURT:** -- tethered to the response deadline, so I
11 will be sure to do that.

12 **MR. KEGLOVITS:** And that's all I have for Your Honor.

13 **THE COURT:** Okay.

14 **MR. O'CONNOR:** Your Honor, may I add a few comments on
15 this issue?

16 **THE COURT:** You may.

17 **MR. O'CONNOR:** Thank you.

18 It's hard to sit there and to listen to a characterization
19 of our discovery effort as you just heard. It's really -- it's
20 difficult. The fact that we somehow have detoured this case or
21 that we have in any way intended any delay, first of all, we
22 have no motivation for that, we want our motion heard. But
23 throughout this meet-and-confer process, and throughout the --
24 we have notebooks of letters that are exchanged weekly on all
25 of these issues. Throughout all of this motion practice,

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1 throughout all of the things that divert us from the attention
2 of concluding the discovery, we are pressed for all custodians.
3 We are never provided any compromise.

4 The suggestion that we should now go review -- I mean, what
5 they're proposing and what they proposed and was contemplated
6 in Judge Kern's order, that we go review all of the custodian
7 files and then we make our own subjective determination of who
8 may be meaningful for their response to the preemption, who may
9 be material, who may be slightly relevant, maybe not that
10 relevant, maybe not relevant at all, would take us two or three
11 more times the amount of time than simply reviewing it, as
12 Ms. Donahue said, for production.

13 This collection and review, we have a chart that shows with
14 respect to each custodian the dates of the productions.
15 They're rolling. So, let's take Dana Swisher, for example.
16 Productions on August 7, August 11, August 14, August 18,
17 August 21, August 23rd, September 11th, September 22nd,
18 September 25, October 2nd, and I believe October 9th,
19 yesterday. So, we had that with respect to all of these.

20 We are not here trying to concoct some extension that we
21 think would somehow benefit us. We're simply trying to not
22 appear in front of you again, because the suggestion, after
23 they wanted all of these custodians, that we can now get it
24 concluded in six weeks, that's what they're asking. I mean,
25 we're not here to say -- in all due respect, if you said,

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1 "You've got six weeks to do this," we've spent -- she's being
2 kind on the hundreds of thousands of dollars. It's much, much
3 more than that. So, when we went back into this
4 proportionality discussion in the course of the discovery,
5 we've now established, as a matter of fact, the significant
6 resources and costs. And here we are, the suggestion that we
7 have put up a wall or haven't helped.

8 The tone -- I tell you, the tone in the meet-and-confers is
9 a lot different than the tone in these hearings and in their
10 papers, and it's disappointing, because we have worked together
11 and we've reached a lot of compromises. It wasn't until August
12 2nd that we agreed on search terms.

13 So, to suggest that we've sat on our hands in any way since
14 that May 8 order, there have been 35 productions since then.
15 So, I just take offense. With all this suggestion of costs or
16 some sanction, the hallmark of their strategy here seems to be
17 delay on their part. I don't understand that. I don't
18 understand how you say, "Give us everything but shorten the
19 time." Or after we tried to limit the custodians to some
20 degree, they wanted everybody. Now they want us to go do all
21 this substantive review. And I guarantee we'd be back here
22 again on motion practice because they wouldn't agree with our
23 conclusion or suggestion that maybe 10 of these custodians have
24 nothing to do with it, but for us to reach that conclusion
25 would take a monumental effort.

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1 So, it's not hide the ball, it's not cloaked in secrecy.
2 All we're doing is trying to comply with the court's orders,
3 reach a production after it's collected. And, you know, this
4 chart really reflects a lot. I mean, this talks about what
5 we're doing. So, the suggestion that we haven't sought, you
6 know, paper documents, that's part of the interview with every
7 employee. We start with their e-mails, "Where is that?"
8 "Well, on this one, we're investigating." "What's
9 'investigating' mean?" "It means we're interviewing them.
10 We're trying to decide, you know, are there flash drives, are
11 there paper sources, are there hard copies." With the former
12 employees, it's more difficult.

13 There's searches for hard copies that, unfortunately, we
14 don't have the benefit of their presence. So, it's difficult.
15 We have employees in Germany and Switzerland that have a whole
16 host of privacy issues and laws that we are trying to navigate
17 through, but it's just more time.

18 **THE COURT:** Mr. O'Connor, how do you respond to their
19 argument that this is a self-inflicted wound, that yes, it's
20 taking a long time because the process you chose takes a long
21 time and they shouldn't be held responsible for that?

22 **MR. O'CONNOR:** Well, we simply couldn't do what they
23 wanted us to do, which is, in their view, produce everything
24 and then we'll deal with the privilege and everything else. We
25 can't operate that way. We have too many clinical studies with

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1 privacy information. We have -- intertwined with all the
2 documents are a lot of other products that Genentech
3 manufactures. There's simply -- there's no way to do that
4 effectively. And, frankly, our client can't do it, as a matter
5 of law, with respect to three or four of those categories. And
6 we do want to review for privilege, and we don't find -- I
7 mean, we can talk about this as we proceed on the
8 meet-and-confers, but, you know, those privilege designations
9 weren't made lightly.

10 And we're really -- you know, while he talks about, you
11 know, 64,000 documents, that's reflective of this review
12 process. There's 905,000 pages that have been produced. One
13 document in Dhyshy's production was 11,000 pages. So this is
14 another, you know, attempt -- you know, after all this effort,
15 we only have 64,000 documents. Well, here's a million pages.
16 And let me tell you, there are 50 lawyers and they are working
17 extensively, some seven days a week. It's going and going and
18 going to make this happen.

19 But to tell us, "Give us all, give us all, Judge, we need
20 everybody, we want everybody, we need all these custodians, we
21 need all the documents," and then to come back at this point
22 and suggest that, "Well, they never wanted to reduce the
23 number, they never wanted to give any kind of limitation," that
24 there's some big cloak over here where we operate in secrecy,
25 that is -- that's disturbing and it really is kind of a punch

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1 in the gut after the work that's going on, that has gone on and
2 continues to go on.

3 I have worked with Mr. Keglovits for 30 years, we've worked
4 together, we've been adverse, I have great respect for him, but
5 I just think to undermine this effort -- we are doing the best
6 we can. We're asking only for a reasonable schedule that will
7 accommodate this, not anything that would delay, but that would
8 allow us to conclude the production of these 51 custodians.

9 **THE COURT:** Okay. Thank you, Mr. O'Connor.

10 **MR. O'CONNOR:** Thank you.

11 **THE COURT:** Okay. The final thing that I want to hear
12 from you both on -- well, first, I want to tell you my thoughts
13 on this expert. Is there anything else on that we need to
14 cover or are we ready to move on? Okay.

15 The expert rebuttal affidavit issue. Here's my thoughts.
16 To me, this is really more of an issue that goes to what Judge
17 Kern's going to consider or not consider on his preemption
18 motion, and I'm not sure that when he referred this issue to me
19 for scheduling, that that was really contemplated in that
20 referral. Your arguments were kind of in footnotes, if I
21 recall, it was kind of buried. I'm not confident that that
22 issue is before me and I think it would be a better procedure
23 for there to be a motion on file specifically by defendant
24 asking for that. And if he refers it, great, and I'll be happy
25 to decide it at that time, but it goes to what he -- the last

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1 thing I want to do is, under the guise of entering a schedule,
2 tie the district judge to considering or not considering
3 something that he wants to do. So -- and at that point, he can
4 decide how he wants to handle that. Probably sooner rather
5 than later is a better course, although I'm not going to tell
6 you, you know, how to go about doing that.

7 **MS. DONAHUE:** That's fine. We understand, Your Honor.

8 **THE COURT:** Okay.

9 **MS. DONAHUE:** If you could just include the fact that
10 you directed us to do that in an order or --

11 **THE COURT:** Yes. So, this issue is not going to be
12 part of this scheduling order. It doesn't mean I'm not happy
13 to decide it at a future time. However, I have decided that I
14 think it would be helpful to go ahead and hear argument on
15 that, if you're ready today. That way, we don't have to come
16 back if he does refer it. Or, if he keeps it, he can have the
17 benefit of your oral argument here today, he can listen to
18 that. So, I would like to hear from you on the expert rebuttal
19 affidavit issue.

20 **MR. O'CONNOR:** Thank you.

21 **THE COURT:** Thanks.

22 **MR. O'CONNOR:** I think this is a novel case in many
23 respects. We start with Rule 26(a)(2)(d)(ii) which
24 specifically allows 30 days for a rebuttal report. This is
25 very unique in that we disclosed our expert and provided

1 plaintiffs with our expert's declaration before we ever even
2 filed the motion for summary judgment, and then it accompanied
3 the summary judgment papers. That was done without the benefit
4 of any discovery.

5 During the course of that discovery, the court allowed an
6 amended summary judgment with an amended declaration. Since
7 that time, there have been depositions taken, there have been a
8 million pages of documents produced, there are going to be, you
9 know -- you know, I would think -- they've designated 30 days
10 for depositions at the conclusion of this discovery.

11 So, it's really a situation where they've had our expert
12 for, as Mr. Keglovits said, for over a year. They want us to
13 have their expert, who we don't even know -- they haven't
14 disclosed that they have one, but if they do have one, it seems
15 like we wouldn't be in this dialogue if they didn't intend to
16 provide one. They want us to then have this limited time frame
17 to consider. I think the reason they want it tethered to their
18 response is because it would provide even less time for us to
19 have an expert consider whatever declaration they submit.

20 But, you know, there is, they claim, prejudice that they
21 wouldn't be able to respond. Well, the case law is pretty
22 clear that there's no prejudice; you're not entitled to rebut a
23 rebuttal. The case law -- There's plenty of case law in the
24 Tenth Circuit on this very issue where courts have allowed
25 rebuttal witnesses, rebuttal experts. They've seen the

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1 reasonably of it. They think it's proper. I mean, the
2 very essence of rebuttal is that you either contradict or
3 oppose the declaration that's submitted in the response brief.
4 So I guess --

5 **THE COURT:** I don't have the benefit of these cases or
6 anything, but I do have a question. Are those cases -- is
7 there new information being raised in their response for the
8 first time?

9 **MR. O'CONNOR:** The only new information that could be
10 categorized that way is information responsive to the -- here
11 it would be the plaintiffs' expert.

12 **THE COURT:** Okay.

13 **MR. O'CONNOR:** Typically, it's a reverse party. But
14 we're not talking about -- we're talking about a response to
15 their expert. That's what -- I mean, I think that's what the
16 rebuttal contemplates. It's not about us going out to a whole
17 new source of documents, creating new opinions for which they
18 would never then be able to respond. It's simply an
19 opportunity after -- since we didn't have the benefit of all
20 this discovery record, to then have the benefit of that, see
21 what their expert says, and have the expert --

22 **THE COURT:** Isn't that a risk you took by filing an
23 early motion for summary judgment on this issue, or not?

24 **MR. O'CONNOR:** Well, I guess it --

25 **THE COURT:** Prior to, because you could have waited

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1 until discovery was over and filed a motion for summary
2 judgment on everything --

3 **MR. O'CONNOR:** Well, --

4 **THE COURT:** -- and then you would have known every
5 fact that you wanted to know before you filed that motion.
6 Instead, you chose this process where you filed it early.

7 **MR. O'CONNOR:** Right.

8 **THE COURT:** And I just want to know, is that a risk
9 that you think you --

10 **MR. O'CONNOR:** I don't think we viewed it as a risk.
11 I think we understood -- I think the norm is a rebuttal expert
12 declaration. I don't think that's an extraordinary request. I
13 think it's what the rules contemplate, what the case law
14 contemplates. So I don't see it as -- I mean, when you're
15 filing a declaration to oppose, to suggest that either the
16 other side's expert is incorrect or otherwise opposing it, I
17 think that's what's contemplated.

18 **THE COURT:** Okay.

19 **MR. O'CONNOR:** So I don't see any prejudice. We're
20 limiting the scope of the expert report to true rebuttal, so we
21 either contradict theirs or oppose it.

22 And, you know, it is the norm, as you said, Your Honor,
23 that the summary judgment would be filed after discovery and
24 that expert reports would accompany them at that time, but this
25 was a unique situation. And I think, with all due respect, I

1 believe Judge Kern believed that it was potentially dispositive
2 of the issues, and it allowed us, even as burdensome as this
3 has been in discovery, you know, it has allowed the court to
4 consider the issue in advance of any class discovery or merits
5 discovery.

6 **THE COURT:** Yeah, and I think he made that decision
7 and he said, "I still find value in this process, I still find
8 value in proceeding in this way." I'm not criticizing the fact
9 that we're doing that. I'm just saying it has its consequences
10 sometimes. Thank you.

11 **MR. O'CONNOR:** Thank you.

12 **THE COURT:** Thanks.

13 **MR. KEGLOVITS:** Your Honor is right, this is a custom
14 process designed by Genentech for its purposes and they should
15 live with the results of the process that they asked for.

16 There really are two declarations that were attached to
17 their motion. One is a fact witness, Mr. Swisher, who is
18 testifying about Genentech's own manufacturing processes, what
19 can and cannot be done. It's hard to imagine that he would
20 need now to come in with a supplemental affidavit saying
21 something else about what can and cannot be done after he's
22 deposed.

23 The other is a Dr. Lynn, who purports to be an expert on
24 what the regulations mean. He obviously was proved wrong once
25 by FDA action, so he had to come in and amend his first

1 declaration to conform it to what the FDA actually says is the
2 regulations. Now I guess they're asking for him to have a
3 chance to come in again.

4 It is not fair, I don't think, to have the movant have an
5 unchallenged last word. And what I mean by that is the last
6 word would come in after we would have filed our response
7 brief, and the last word comes in when we don't even know what
8 it is. Under any conventional discovery process, you're going
9 to have the report from the other side's expert, they're going
10 to have your report, and then you're going to depose the
11 experts. And in those depositions, you're going to be able to
12 find out everything that their expert thinks about what your
13 expert said, so that when you sit down to file your motion for
14 summary judgment, everybody knows everything that's going to be
15 admissible at trial, and anything else that somebody tries to
16 throw into the mix, either at summary judgment or trial, stands
17 a very high likelihood of being excluded because it wasn't
18 disclosed timely, and they're proposing to throw all that
19 aside. And we would go depose their fact witness and their
20 regulations expert, we would file a response brief, and then
21 they would come in with a declaration that says, "Here's a
22 bunch of other things," and we would just sit on the sideline
23 and say, "Gosh, it would have been nice to know that when we
24 filed our response brief."

25 And I think it's notable that it wasn't part of their ask

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1 back in June of 2016, and it certainly wasn't part of the
2 court's order, and I think at this point, given everything that
3 we're trying to accomplish here, to add another layer of last
4 word in a way that is unfair to us shouldn't happen.

5 **THE COURT:** Thank you.

6 Hearing from both of you, I'm even more convinced that this
7 would be a good subject of a motion with procedural rules and
8 case law because I think that would be -- either me or Judge
9 Kern would like to consider that.

10 Okay. I am going to take all of this under advisement and
11 I'm going to issue an amended scheduling order sometime in the
12 next few days, and you'll know what your deadlines are going to
13 be.

14 Mr. Keglovits, I am interested in one thing you said, which
15 is if you're going to extend it, we want a chance to have
16 some -- it sounded like interim deadlines. I think it might be
17 worthwhile, if you have a proposal for that, do you mean with
18 specific people or -- what's your proposal for a schedule that
19 had interim deadlines, assuming that I were going to extend it
20 past December 22nd? I know that's your first choice.

21 **MR. KEGLOVITS:** Okay. Well, first, it's disappointing
22 to hear there's only one interesting thing that I said.

23 **THE COURT:** You're lucky there was one.

24 **MR. KEGLOVITS:** I know. That's the other side of it.
25 I think there are some places that we have not got any

1 documents from. For example, I think the complaints database,
2 we don't show that we've gotten any documents from that place,
3 as well as custodians. So, we would want to be able to
4 prioritize it.

5 If Your Honor was to make it three months or
6 three-and-a-half months or something like that, to have within
7 the first 30 or 45 days the particular documents of highest
8 interest to us. So, be able to say to them, "Search the
9 complaints database and use the search terms and give us those
10 documents and finish Mr. Swisher and finish Mr. Nolden within
11 that first period of time," so that the plaintiffs can dictate,
12 if we're going to have a longer pace, what happens within those
13 different windows.

14 **THE COURT:** How would you propose that schedule look?
15 Would you like to submit a proposal, or do you want me to come
16 up with -- I mean, how do you propose we go about doing that?

17 **MR. KEGLOVITS:** I think by the end of today we could
18 send to Your Honor how we would prioritize it if -- let's say
19 we split it into thirds, let's imagine there are going to be
20 three months for discovery, here's what would happen in our
21 world in the first month, here's what would happen in the
22 second month, and everything else would happen in the third
23 month.

24 **THE COURT:** I understand that would be difficult until
25 you know the time frame that you're working within, --

1 **MR. KEGLOVITS:** Right.

2 **THE COURT:** -- but it would be helpful -- I would like
3 you to submit some sort of supplemental -- we could call it a
4 supplemental -- a supplement to your proposed -- to your
5 proposal that's currently on file, and without specifying
6 dates, because I'm going to decide the dates, --

7 **MR. KEGLOVITS:** Highest priority, second highest
8 priority, --

9 **THE COURT:** Yes.

10 **MR. KEGLOVITS:** Okay.

11 **THE COURT:** That would be helpful. And I will hear
12 from you on that, as well, Ms. Donahue, right now. I'm not
13 saying I'm going to do that. I want to see what he's -- I want
14 to have a visual of what he's --

15 **MS. DONAHUE:** Right.

16 **THE COURT:** -- talking about.

17 **MS. DONAHUE:** And I want to begin by saying we have no
18 problem whatsoever with interim check-ins. The problem we do
19 have is, if you get down to specifics, for instance, if they
20 were to give Your Honor a list of, "These custodians should be
21 complete by this date," there's a number of reasons why we
22 don't know for sure what we've got about certain people, so for
23 us to commit to a completion and have to come in and tell Your
24 Honor -- I mean, we can tell you why we couldn't do it -- but
25 those are just arbitrary. I mean, if they have certain folks

1 that they want us -- that they think are a priority, we'd love
2 to hear from them on that and we can do something to focus on
3 those people.

4 But, you know, as Mr. O'Connor said, the whole Swiss thing
5 gives us -- you know, it just adds a layer. They have really
6 stringent privacy laws there that require -- there's criminal
7 penalties if we produce in a certain way. It requires a level
8 of review that, you know, is different than here in the United
9 States. So, there's just certain things that make it difficult
10 for us to commit to certain custodians at certain times.

11 That being said, if they want to tell us who they'd like us
12 to be focusing on, you know, we'll try to do it that way. I
13 mean, the interim thing is fine. It's just that with specific
14 deadlines on certain people, it's going to be difficult for us.

15 Secondly, in terms of the complaints file, I think we're
16 close to getting that produced to them, so that's just -- you
17 know, I don't think that's going to be an issue. And I guess
18 that's it.

19 But in terms of the interim check-ins, we're good.

20 **THE COURT:** Okay. Well, I don't want to make more
21 work for both of you, and I don't want to have, you know, too
22 many -- order you to file too many briefs, but I'm still going
23 to ask you to submit that response.

24 And, Ms. Donahue, if there's something that you want to say
25 in response to that, I will give you two days after that.

1 **MS. DONAHUE:** Okay. Thank you, Your Honor.

2 **THE COURT:** And I don't anticipate it being long or
3 anything, --

4 **MS. DONAHUE:** No.

5 **THE COURT:** -- but I'll give you two days to respond
6 to that. And so you will not be getting your amended schedule
7 until I've received that and I've given them two days, and then
8 after that you'll get a ruling.

9 Okay. Is there anything else that we need to take up here
10 today -- oh, besides the issue of maybe setting a next
11 schedule -- is there anything else besides that from you,
12 Mr. Keglovits?

13 **MR. KEGLOVITS:** No, Your Honor.

14 **THE COURT:** From you, Ms. Donahue?

15 **MS. DONAHUE:** No, Your Honor.

16 **THE COURT:** Okay. Like I said, you know, I'm new, I'm
17 learning this process. I don't know that I love the idea of
18 just setting a hearing for the sake of setting a hearing two
19 weeks out. I think that it would be better served to wait
20 until something comes up and you all to ask for that hearing.
21 So, as of now, I'm not going to just set a hearing. If there's
22 an issue, it sounds like we might have some privilege issues.
23 But, again, if you want to call and say, "Listen, we have
24 something we need to talk to you about, we think a telephonic
25 hearing would be helpful or a quick hearing would be helpful,"

1 I'm happy to do that, but I'm not just going to set a hearing
2 two weeks from today. Like I said, I'm learning, and I may
3 amend that some day and decide that that would be a good idea,
4 but right now I'm going to wait until there's a specific issue
5 to decide.

6 **MR. KEGLOVITS:** May I ask one question?

7 **THE COURT:** You may.

8 **MR. KEGLOVITS:** So, just thinking down the road, let's
9 imagine we get to the end of this week or maybe mid week next
10 week and we've hit a stall on the meet-and-confer on the
11 privilege and we now have to move to compel the production of
12 these documents, there's a 15 or 18-day or whatever the time
13 period is for them to respond, and then us to reply, --

14 **THE COURT:** Right.

15 **MR. KEGLOVITS:** -- can we, in the filing of the
16 motion, ask you to set a hearing date that's maybe even got
17 shortened periods?

18 **THE COURT:** Absolutely. I think that is very
19 reasonable and I would probably do that anyway --

20 **MR. KEGLOVITS:** Okay.

21 **THE COURT:** -- knowing what we're working against.
22 And I've been trying to do that with general motions to compel;
23 I'm not letting the full -- I'm not allowing the full response
24 time, I'm setting responses a week out and then setting for
25 hearing. In this case, knowing that we're working against, you

1 know, some kind of schedule, scheduling issues, I would
2 definitely not allow a full briefing schedule. So feel free to
3 request that.

4 Anything else?

5 **MS. DONAHUE:** No. Thank you very much.

6 **MR. KEGLOVITS:** No, Your Honor.

7 **THE COURT:** Okay. Thank you.

8 Court's adjourned.

9 **MS. DONAHUE:** Thank you.

10 **THE DEPUTY COURT CLERK:** All rise.

11 (PROCEEDINGS CLOSED)

12 **REPORTER'S CERTIFICATION**

13 WHILE NOT PRESENT IN PERSON TO STENOGRAPHICALLY REPORT THE
14 FOREGOING PROCEEDINGS, I CERTIFY THAT IT WAS TRANSCRIBED TO THE
15 BEST OF MY ABILITY FROM A DIGITAL AUDIO RECORDING.

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